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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street NW
BSIC, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: EAC 02 279 53174 Office: Vermont Service Center Date: JUN 12 2003

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R.§ 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner plans to open a Korean specialty bakery that will provide in-store and catering services to its customers as well as distribution of its products. It desires to employ the beneficiary as its Korean bakery specialty instructor for one year. The Department of Labor determined that a temporary labor certification by the Secretary of Labor could not be made. The director determined that the petitioner had not established that the need for the services to be performed is temporary.

On appeal, counsel states that the position offered is solely instructional in nature.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii), defines an H-2B temporary worker as:

> an alien...having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), as codified in current regulations at 8 C.F.R. § 214.2(h)(6)(ii), specified that the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties that is controlling. *See* 55 Fed. Reg. 2616 (1990).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B).

The petition indicates that the employment is a one-time occurrence and that the temporary need is unpredictable.

The regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(1) states that for

the nature of the petitioner's need to be a one-time occurrence, the petitioner must establish that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads in pertinent part:

> Teach and train bakers/kitchen staff of newly established bakery in the preparation and presentation of Korean specialty baked goods and pastries, including Kasteras, Mocci rolls, Guriballs, Potbingsu, Andos, Korokes, etc., as well as in how to run and manage the kitchen. Demonstrate how to measure and mix ingredients and how to shape, cut, decorate, garnish and present baked goods/pastries. Instruct on proper proportions, purchasing requirements, cooking times and temperatures, proper storage methods, etc. Evaluate progress of personnel and modify instruction accordingly. Modify and finalize menu according to customer preferences and establish kitchen management system.

Petitions pursuant to section 101(a)(15)(H)(ii) of the Act for a class or type of employee for which the petitioner has a permanent need where the petitioner makes attempts to establish the temporariness of its need for the beneficiary's services by stipulating that the beneficiary will function as a trainer or instructor rather than in a productive capacity must be accompanied by evidence of the existence of a training program, by evidence that the petitioner has recruited or hired trainees, and by evidence that the petitioner can viably employ a full-time instructor and can viably simultaneously operate a training program and a commercial or other enterprise. *Matter of Golden Dragon Chinese Restaurant*, 19 I&N Dec. 238 (Comm. 1984).

The petitioner explains that its training program is expected to last one month prior to commencing operations, and thereafter, the training will continue as on-the-job training. The petitioner has not explained how it plans to operate its business and conduct a training program, simultaneously, especially when the petitioner states that they require a training period of at least seven months in order for the trainees to be able to adequately carry out their job duties. The petitioner also states that the beneficiary will be responsible for finalizing kitchen operations for approximately five months. The petition indicates that the projected number of employees is ten. The petitioner makes no indication of having permanent employees who can operate the bakery while its other employees are being trained. Absent a specific breakdown of the

petitioner's training program, the petitioner has not established that the beneficiary will not be engaged in productive full-time employment. Therefore, the petitioner has not shown that the nature of its need for a Korean specialty bakery instructor is temporary in nature.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.